

LUCINDA L. STORM, ESQ. (State Bar No. 129541)  
KENNETH D. HOLLENBECK, ESQ. (State Bar No. 196131)  
LAW OFFICES OF LUCINDA L. STORM, ESQ.  
610 A Third Street  
San Francisco, California 94107  
Telephone: (415) 777-6990  
Facsimile: (415) 777-6992

6 Attorneys for Defendant,  
Durabla Manufacturing Company

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

12 RUSSELL C. ROBERTS, JR., } Case No.: C 08-01338 JL  
13 Plaintiff, }  
14 vs. }  
15 A. W. CHESTERTON COMPANY, et al. }  
16 Defendants. }  
17 }  
18 }  
19 }  
20 }

DEFENDANT DURABLA  
MANUFACTURING COMPANY'S  
OPPOSITION TO PLAINTIFF'S  
MOTION TO REMAND AND JOINDER  
IN DEFENDANT CRANE CO.'S  
OPPOSITION TO PLAINTIFF'S  
MOTION TO REMAND

Hearing Date: March 19, 2008  
Time: 9:30 a.m.  
Courtroom: F, 5<sup>th</sup> Floor  
Judge: Chief Magistrate Judge James  
Larson

Defendant, Durabla Manufacturing Company, (“Durabla”), joins in Defendant Crane Co.’s Opposition to Plaintiff’s Motion to Remand for Lack of Jurisdiction, including the Declaration of Geoffrey M. Davis, the Memorandum of Points and Authorities in Support of Motion and Exhibits A through G thereto and opposes Plaintiff’s Motion to Remand as follows.

25 Plaintiff's settlements with all non-diverse defendants including Waldron Duffy, Inc.,  
26 ("Waldron") make the case removable so long as the other requirements for removal based on  
27 diversity jurisdiction have been satisfied, including the amount in controversy, consent and time

1 limits. 28 U.S.C. § 1441(a); 28 U.S.C. § 1446(b). Waldron, Foster Wheeler USA Corporation,  
2 Asbestos Corporation, Ltd., and Crown Cork & Seal Company, Inc. are no longer parties to this  
3 action because they have reached “agree to agree” settlement arrangements with Plaintiff.  
4 (Plaintiff’s Notice of Motion and Motion to Remand at p. 3:13-5; Declaration of Dean A. Hanley  
5 in Support of Plaintiff’s Motion to Remand, p. 3: 7; 24-25). This type of settlement agreement is  
6 binding and enforceable. As stated in *Stewart v. Prestine Pipeline Inc.*, a settlement agreement  
7 does not have to meet all the procedural requirements to be enforceable. 134 Cal.App.4<sup>th</sup> 1565,  
8 1584 (2005). Due to the fact that Plaintiff and Waldron, Foster Wheeler USA Corporation,  
9 Asbestos Corporation, Ltd., and Crown Cork & Seal Company, Inc have entered into enforceable  
10 settlement agreements, they cannot be a party to the present case and cannot be used as a reason  
11 to defeat diversity jurisdiction. Despite the fact that the settlement may be informal or not yet  
12 final, removal is still appropriate in this case.

13         The same reasoning and law applies to the settlements and resolutions with J.T. Thorpe &  
14 Sons, Inc., Metalclad Insulation Corporation, NIBCO, Inc., Thorpe Insulation and Warren  
15 Pumps. (Plaintiff’s Notice of Motion and Motion to Remand at p. 4:-1-4; 8-11; 14-16.).

16         Removal has been found to be proper in cases where non-diverse defendants have not  
17 been formally dismissed. *Mancari v. AC&S Co.*, 683 F. Supp. 91, 93 (D. Del. 1988); *Rowe v.*  
18 *Johns-Manville*, 658 F. Supp 122, 123 (E.D. Pa. 1987); *Lesher v. Andreozzi*, 647 F. Supp. 920,  
19 921 (M.D. Pa. 1986); *DiNatale v. Subaru of America*, 624 F. Supp. 340 (E.D. Mich. 1985);  
20 *Erdey v. American Honda*, 96 F.R.D. 593 (M.D. La. 1983); *Heniford v. American Motor Sales*  
21 Corp., 471 F. Supp. 328 (D. S.C 1979). All that is required is that the non-diverse defendants be  
22 dismissed or abandoned by a voluntary act of Plaintiff. *Schmidt v. Capitol Life Insurance Co.*,  
23 626 F. Supp. 1315, 1318 (N.D. Cal. 1986). By “agreeing to agree” plaintiff has effectively  
24 discontinued his case against these entities. Since Plaintiff’s claims against have been settled,  
25 there are no resident defendants remaining. Therefore, complete diversity exists, and the case  
26 has become removable and was timely removed as is set forth in the Crane Co. Opposition to the  
27 Motion to Remand. (Crane Co. Opposition to Motion to Remand at p.3:12-16; p.15:10-21).

## **REQUEST FOR REMAND RELATED DISCOVERY**

Should the Court determine that the settlements Plaintiff has acknowledged exist with Waldron, Foster Wheeler USA Corporation, Asbestos Corporation, Ltd., Crown Cork & Seal Company, Inc., or the issues with respect to Warren Pumps, Thorpe Insulation and NIBCO, Inc., do not effectively remove these entities from the case, then Durabla moves, in the alternative, for the Court to allow remand related discovery and to provide sufficient time to accomplish reasonable discovery prior to the hearing on this matter.

Dated: March 13, 2008

LAW OFFICES OF LUCINDA L. STORM, ESQ.

decided. Farm

Lucinda L. Storm, Esq.  
Kenneth D. Hollenbeck, Esq.  
Attorneys for Defendant,  
**DURABLA MANUFACTURING COMPANY**

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California by a member of the Bar of this Court at whose direction this service was made. I am over the age of 18 and not a party to the within action. My business address is 610A Third Street, San Francisco, California 94107. On March 13, 2008, I served the document(s) described as:

**CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE**

on the party(jes) to this action named on the attached service list by the method described below.

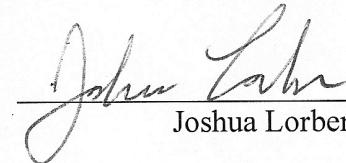
X: (BY ELECTRONIC MEANS) – I transmitted a true and correct copy of said document(s) by electronic mail to the offices of the addressee(s). I did not receive, within a reasonable time after the transmission, any message or indication that the transmission was unsuccessful.

X: (BY U.S. MAIL) – I enclosed a true and correct copy of said document(s) in an envelope addresses to the addressee(s) listed above and place it for collection and mailing following the ordinary business practices of the Law Offices of Lucinda L. Storm, Esq. I am readily familiar

1 with the firm's practice of collecting and processing correspondence for mailing. On the same  
2 day that correspondence is placed for collection and mailing, it is deposited in the ordinary  
3 course of business with the U.S. Postal Service with postage fully prepaid at San Francisco,  
California.

4 Executed on March 13, 2008, at San Francisco, California.

5 I declare under penalty of perjury that the foregoing is true and correct.

6   
7 \_\_\_\_\_  
8 Joshua Lorber

17 SERVICE LIST

18 Stephen J. Healy, Esq.  
19 Deborah R. Rosenthal, Esq.  
PAUL AND HANLEY LLP  
20 1608 Fourth Street, Suite 300  
Berkeley, CA 94710  
Tel: (510) 559-9980  
Fax: (510) 559-9970  
[shealey@paulandhanley.com](mailto:shealey@paulandhanley.com)  
[drosenthal@paulandhanley.com](mailto:drosenthal@paulandhanley.com)  
*Counsel for Plaintiff Russell Roberts, Jr.*

Geoffrey M. Davis  
K&L GATES  
55 Second St. Suite 1700  
San Francisco, CA 94105  
Tel: (415) 249-1003  
Fax: (415) 882-8220  
[Geoff.Davis@Klgates.com](mailto:Geoff.Davis@Klgates.com)  
*Counsel for Defendant Crane Co.*